No. 4585

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

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DAVID PEARLMAN,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

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STATEMENT OF THE CASE.

The plaintiff in error, who will hereafter be referred to as the defendant, was accused by indictment of the violation of Section III of the National Motor Vehicle Act of October 29th, 1919. The indictment alleging that the defendant did on or about July 28, 1922, unlawfully, wilfully, knowingly and feloniously transport and caused to be transported from the City of New York to the City of San Francisco a certain Cadillac automobile, the defendant then and there well knowing that at the time of said transportation said automobile had been stolen.

On November 10, 1922, the defendant pleaded not guilty and upon March 16, 1925, the defendant was tried and on March 17, 1925, a verdict of guilty

was returned by the jury. Thereupon the defendant made a motion for a new trial which was denied and a motion in arrest of judgment which was denied, and thereafter and on the 17th day of March, 1925, the court pronounced judgment upon the defendant and ordered that the defendant be imprisoned for five years in the United States penitentiary at Leavenworth, Kansas, and ever since the defendant has been incarcerated under said sentence and is now in the United States penitentiary, being at no time able to furnish the amount of bail set by the court.

The conviction of this defendant amounts to an attempt on the part of the Government to insist upon a judgment of conviction where the case against the defendant is entirely infirm in certain specific and essential features, and where the defendant has been convicted on evidence that is absolutely inadequate and insufficient. The plain, simple fact is, that the Government proceeded to trial in this case without certain witnesses necessary to the establishment of the true facts of the case, who were living in New York, and who should have been present to testify with regard to the facts and circumstances under which the automobile in question was taken from New York, and whose testimony we are confident would have established the innocence of the defendant. The owner, or alleged owner of the automobile was not produced as a witness and there is no proof in the case that the automobile in question ever had an owner, except the defendant.

There is no proof that the owner of the automobile in question did not consent that it might be taken by the defendant, assuming that the defendant was not and is not the owner of the automobile, and all this amounts to lack of proof that the automobile ever was or could have been stolen. There is no proof that the automobile was transported from New York to San Francisco, except certain alleged admissions by the defendant which admissions were improperly allowed in evidence over the objection of the defendant, and which should have been stricken out in response to the defendant's motion, particularly on account of the fact that no foundation was laid for the introduction of proof of these admissions, in this, that there was no evidence to prove the *corpus delicti,* except these extra-judicial statements of the defendant; and furthermore, the infirmities of the case for the Government were directly struck at by the defendant by a proper and seasonable motion made at the termination of the Government's case requesting the court to instruct the jury to acquit the defendant, which motion should have been granted, because even allowing for the testimony which was improperly admitted and which should have been stricken out, the Government had failed to meet its obligation to establish the essential elements of the offense by proper and sufficient testimony.

SPECIFICATIONS OF ERRORS RELIED UPON.

I.

The court erred in not instructing the jury to acquit said defendant at the conclusion of the presentation of the case for the Government and of all of the evidence for the Government against said defendant. The evidence was insufficient to establish the allegations of the indictment or to convict said defendant and plaintiff in error, particularly in that it was not proven or established that the automobile in question and referred to in the indictment was stolen, and for the further reason that it was not proven or established that the said automobile was transported or driven or taken any place, or from state to state by said defendant. There was no proof that the automobile named in the indictment ever had an owner, or that anyone other than said defendant was the owner of said automobile, or that the owner if any, of said automobile did not consent to the taking of the same by said defendant; there was no proof of a larceny or the stealing of said automobile by anyone; the only evidence covering the matters referred to in this paragraph consisted of alleged statements by the defendant and this evidence was incompetent and hearsay, because it was an attempt on the part of the Government to establish the *corpus delicti* of the offense alone by the admissions and statements of the defendant, when no other evidence had been introduced or was later introduced to establish the *corpus delicti*. The defendant and plaintiff in

error raised the various questions herein pointed out by appropriate and timely exceptions to the introduction of the evidence of the Government and by appropriate and timely motions to strike out the evidence of the Government and by a motion for a directed verdict of not guilty, which said motion for a directed verdict was made at the conclusion of the Government's case, and to the court's orders overruling defendant's objections to the introduction of said testimony and denying said motions defendant and plaintiff in error duly excepted.

II.

The court erred in overruling and denying the motion for a new trial made by said defendant.

III.

The court erred in overruling and denying the motion in arrest of judgment made by said defendant.

IV.

The court erred in denying the motion of said defendant to strike out certain testimony of the witnesses for the Government, which said motion was made at the conclusion of the case of the Government upon said trial.

V.

The court erred in permitting the witness S. J. Adams to testify, over the objection and exception

of the defendant to certain statements made by the defendant, the question being as follows:

"Q. Now will you relate to the court and to the jury as near as you now remember it, Mr. Adams, the conversation as it relates to the matter in question?"

VI.

The court erred in denying defendant's motion to strike out certain testimony of said witness, Adams, which said motion and the exception to the ruling of the court is as follows:

"Mr. CUNHA. Now if your Honor please, keeping in mind that perhaps your Honor will direct the order of proof, I make a motion that *that* the testimony of this witness in which he states that the defendant told him that he had driven the car across the continent, anything with regard to driving the car, be stricken from the record on the ground it is immaterial, irrelevant and incompetent, and an attempt to prove the *corpus delicti* in this case by a confession or a statement of the defendant. I take it, if your Honor please, that you have the discretion as to the order of proof, but to prove the *corpus* of the offense by admissions or statements of the defendant, I think it will be conceded it is beyond the law and is an invasion of the rights of this defendant. That is the point that we make, if your Honor please, that finally in this case the *corpus delicti* must be proved—

The COURT. I do not want any argument; just state the point fully.

Mr. CUNHA. We base our motion to strike out all of the testimony given by the witness on all of the grounds heretofore stated.

The COURT. Motion denied.

Mr. CUNHA. Exception."

VII.

The court erred in permitting the said witness, Adams, to testify, over the objection and exception of the defendant, to certain statements made by the defendant, the question being as follows:

"Q. What was the date of the purchase, the date that the defendant told you he purchased the car in the City of New York, if you remember?

Mr. CUNHA. We object to that upon all the grounds heretofore stated, and upon the ground it is immaterial, irrelevant, and incompetent, calls for hearsay testimony, on the further ground that no foundation for the evidence has been offered or introduced, upon the further ground that all of this testimony with regard to conversations with the defendant or conduct of the defendant with regard to the bill of sale and otherwise in connection with this automobile is merely an attempt to prove the *corpus delicti* in this case by admissions from the defendant or statements from the defendant either by conduct or by actual verbal statements, and it is incompetent.

The COURT. Overruled.

Mr. CUNHA. Exception.

The COURT. You have several times quite fully stated your objection. It will save time if it is understood or that it be stipulated that your objection goes to the testimony of this witness concerning the conversation or statements made by the defendant to him, and also with regard to anything having to do with bills of sale or anything else about that machine.

Mr. CUNHA. And may we have our exception?

The COURT. I am willing that you should."

VIII.

The court erred in allowing said witness, Adams, to testify, over the objection and exception of the defendant, to certain statements of the defendant, the question being as follows:

"Q. Did he tell you what date he arrived here—go ahead with your story?"

IX.

The court erred in permitting the witness, Adams, over the objection and exception of the defendant, to testify to the contents of a certain bill of sale, the objection of the defendant being based upon the ground, among others, that the evidence introduced was not the best evidence, some of the said questions being as follows:

"Q. Now referring again to the bill of sale to which you testified I will renew the question that I withdrew, do you now remember where the bill of sale was dated?"

"Q. Do you remember about the date shown on that bill of sale?"

"Q. Do you remember the name of the man who signed it?"

The Government laid no foundation for the introduction of secondary evidence in this connection.

X.

The court erred in permitting said witness, Adams, to testify, over the objection and exception of the defendant, to certain matters concerning the number of the automobile in question, the said question being as follows:

"Q. In your examination of the motor block or wherever the number happens to be, did you notice any change or attempt to change the number?"

XI.

The court erred in permitting the witness, M. L. Britt, to testify, over the objection and exception of the defendant, to certain statements made by the defendant, the questions being as follows:

"Q. Will you state to the court and jury as near as you remember just the conversation at that time as it relates to this change here before this court and jury?

Q. What did he say?

Q. Was there any conversation concerning the car, the Cadillac Sedan which was in the *possession Leong* when you first saw it?

Q. Did he tell you what he paid for it?"

XII.

The court erred in permitting the said witness, Britt, to testify, over the objection and exception of the defendant, to certain statements made by the defendant concerning his movements, the said question being as follows:

"Q. What if anything was said by him concerning his method of going to San Francisco?"

This was clearly an attempt on the part of the Government to prove the *corpus delicti* by the statements of the defendant, unsupported by any other testimony.

XIII.

The court erred in denying the motion of the defendant, to strike out the testimony of the said witness, Britt, which said motion was made at the conclusion of the testimony of said witness, the said motion and ruling being as follows:

"Mr. CUNHA. We make a motion that all of the testimony of this witness upon all the grounds heretofore urged be stricken out, especially objecting to the admission of statements in evidence of this defendant and conduct of this defendant, and ask that they all be stricken from the record upon all the grounds heretofore urged.

The COURT. Motion *died*.

Mr. CUNHA. Exception.

XIV.

The court erred in permitting the witness, William F. Milliken, to testify, over the objection and

exception of the defendant, to certain matters with regard to the number of the automobile in question, the question being as follows:

"Q. Will you describe to the court and jury what you saw, how that number appeared?"

XV.

The court erred in permitting said witness, Milliken, to testify, over the objection and exception of the defendant, to certain statements made by said defendant, and to certain conversations with said defendant, the questions being as follows:

"Q. Will you state as nearly as you now remember just what that conversation was?

Q. What else?

Q. Did he tell you he came across the country from New York?

Q. In what?"

XVI.

The court erred in making an order, over the objection of the defendant that the witnesses for the Government be allowed to testify in narrative form, and that the defendant be denied the right to make any objection or motion until the narrative of the witness was completed, the said ruling and objection being as follows:

"The COURT. Now, counsel, in the beginning of this examination of witnesses I sustained objections that were made by you to permitting witnesses to tell their story to the jury in narrative form, so that you might have the opportunity of making

objections when questions were asked and before the answers were made. Now, I thought that would give you an opportunity to interpose what objections you have a right to interpose in protecting the rights of your client. It seems we are going to use up a lot of time if I permit the examination to go ahead in that manner, so I think that, for the purpose of saving time and expediting this trial I will permit the witness to answer the questions that may be propounded by the attorney for the Government in narrative form, and that when the witness has finished his answer you may then interpose such motions and such objections as you see fit. Now, do not interrupt the witness until he has finished his answer in narrative form.

Mr. CUNHA. To which ruling of the court we respectfully take an exception.

The COURT. You have objected to every statement, but do not interrupt this witness until he is through, and then make all the objections you want to. Now, Mr. Fink, frame a question such as you think you would like to ask this witness, and we will proceed."

This occurred during the testimony of the witness, J. W. Ehrlich, and was clearly prejudicial to the defendant in that said ruling denied to the defendant the right to proceed with his trial in accordance with the law, and the ordinary rules of procedure. The ruling was clearly an invasion of the rights of the defendant, and prejudiced the defendant in the eyes of the jury in that it created an impres-

sion with the jury that the conduct of the defendant, and his counsel, in making proper objections to the testimony offered by the Government, was an indication of guilt on the part of the defendant and was improper conduct on the part of the defendant.

XVII.

The court erred in permitting the witnesses, S. J. Adams, over the objection and exception of the defendant, to testify to certain statements made by the defendant, the questions being as follows:

"Q. Do you recall a conversation with this defendant, in which the defendant told you what he knew about how he got the car?

Mr. CUNHA. I object to that upon all of the grounds heretofore urged as to admissions and statements of this defendant, and upon the further ground it is leading and suggestive.

The COURT. Overruled.

Mr. CUNHA. Exception.

A. Do you refer to a conversation as to where he claimed he bought the car?

Mr. FINK. Yes. You have already testified to that?

A. Yes.

Q. Did you have a later conversation in which he stated what he found out about the car?

A. Yes, he said he did not know it was a stolen car until a few days after he left New York.

Q. What did he say about his knowledge at that time?

Mr. CUNHA. The same objection.

The COURT. Overruled.

Mr. CUNHA. Exception.

A. Well, I cannot exactly say.

Mr. FINK. Q. Did he say to you, or did he not say to you that he knew it was a stolen car?

A. Yes.

Mr. CUNHA. Just a moment, I object to that on all of the grounds heretofore urged, and on the ground it calls for the mere conclusion and opinion of the witness, and not binding upon this defendant, no foundation laid, hearsay, and on the further ground it is leading and suggestive.

The COURT. Overruled.

Mr. CUNHA. Exception.

A. As I said before, he said that he did not know it was a stolen car until he left New York.

Mr. FINK. That is all.

Mr. CUNHA. No questions."

The foregoing is the only testimony of the record to the effect that the automobile in question was stolen. In substance this testimony is clearly hearsay, because at best it is merely a statement of what the defendant had learned. It does not constitute competent evidence that the automobile was stolen and is clearly an attempt to prove the *corpus delicti,* by the statements of the defendant, unsupported by any other evidence. The Government failed to produce as a witness anyone who claimed to be the owner of the automobile in question, and did not account for the failure to produce such a witness, and the lack of such testimony, and the

failure to produce such witness cannot be made up for by hearsay and incompetent testimony consisting merely of statements by the defendant, for the introduction of which no foundation was laid.

XVIII.

The court erred over the objection and exception of the defendant in denying the motion of said defendant to strike out the testimony of the witnesses for the Government which said motion was made at the conclusion of the testimony for the Government and is as follows:

"Mr. CUNHA. If your Honor please, at this time I make a motion now that all of the testimony of the witnesses for the Government, and particularly the testimony of the defendant. and conduct on the part of the defendant, that all that testimony be stricken out, upon the ground that no proper foundation has been laid for the testimony, on the ground that there is nothing connected up, and the further ground it is immaterial, irrelevant and incompetent, hearsay, and not binding upon the defendant, upon the ground that it has been merely an attempt to prove the corpus of this offense, the *corpus delicti* by admissions, statements of the defendant, and by conduct on the part of the defendant, which must come in under the head of admissions. I make a motion that all of that testimony be stricken out on all of the grounds heretofore stated, and upon all the grounds urged at the time the testimony was objected to.

The COURT. Denied.
Mr. CUNHA. Exception."

XIX.

The court erred in instructing the jury, over the objection and exception of the defendant as follows:

"The COURT. Gentlemen, the officer in charge of you has indicated to me that you wish to ask a question.

The FOREMAN. Yes, your Honor, we do desire to ask you a question about whether or not the defendant should have had knowledge that this was a stolen car.

The COURT. The language of the indictment, gentlemen, is quite plain. The indictment charges that David Pearlman, on or about July 28, 1922, in violation of Section 3 of the National Motor Vehicle Act of October 29, 1919, did unlawfully, willfully, knowingly and feloniously transport and cause to be transported in interstate commerce, to wit: from the City of New York, in the State of New York, to San Francisco, in the State of California, a certain motor vehicle, to wit: a Cadillac automobile, motor No. 18,664, said defendant then and there well knowing that, at the time of said transportation, said motor vehicle had been stolen.

Now, the charge in the indictment is based upon the provisions of the statute. The indictment contains the same language that the statute contains, that is to say, the same language with reference to transportation and with reference to knowledge.

My recollection of the provisions of the statute is that it must be with guilty knowledge, that is to say, the transportation must take place, or must be made by the defendant, the defendant then and there well knowing that at the time of the transportation the motor vehicle had been stolen.

The clerk has handed me the Federal Code, and, referring to that, I find that the language is 'knowing the same to have been stolen.' Those words are in the statute, 'knowing the same to have been stolen.' Does that answer your question?

The FOREMAN. I think it answers it partly. Must he have had knowledge on the date of July 28th?

The COURT. On or about that date. My view of that would be that if an offense were committed it might be said to be a continuing offense, that is to say, that he might or might not have known that the automobile had been stolen when he left the State of New York. I take it that if he thereafter had learned that the automobile had been stolen after he left New York and he continued on his way across the country through other states and came to California, I should say that, if you find that that was the evidence, that that would be sufficient to sustain a conviction. Is that clear?

Mr. CUNHA. On behalf of the defendant, if your Honor please, we except to the instruction just given by the court."

These instructions are erroneous because the defendant was charged specifically in the indictment

with transporting the automobile from New York to San Francisco, also when specifically questioned by the jury it became the particular duty of the court, as it was already the court's duty to instruct the jury that the burden was upon the Government to prove that the automobile was stolen, and no such instruction was given at any time by the Court in response to the court's obligation to properly define the elements of the crime in question and the necessary proof in support thereof.

Statements of full substance of testimony admitted over the objection and exception of the defendant and plaintiff in error, as heretofore referred to and pointed out herein in defendant's assignment of error.

Assignment of Error No. 5.

The statements of the defendant testified to in connection with and as pointed out by this assignment is in substance as follows:

"Mr. Pearlman stated that he had purchased the car in New York City from a second-hand auto market at Third Avenue and Thirteenth Street, and that he did not know the seller's name. That he drove the car direct to San Francisco from New York with the exception of a stop over at Salt Lake. He had a bill of sale for the car that was issued in Los Angeles and was made out to a man by the name of Lewis; some second-hand auto market there.

ASSIGNMENT OF ERROR NO. 6.

The testimony of the witness, Adams, which should have been stricken out as claimed by this assignment of error is the testimony immediately given above under assignment of error No. 5.

ASSIGNMENT OF ERROR NOS. 7, 8, 9, 10.

The statements of the defendant testified to in connection with, and as pointed out by these assignments of error is as follows:

"The defendant told me he purchased the car in the City of New York on July 28th; that he left New York the latter part of July and got to San Francisco about September 6th. The bill of sale to which I testified was dated Los Angeles the 14th of August, and the heading on the stationery was 'Lewis.' In my examination of the motor block I noticed a change or attempt to change the number."

ASSIGNMENT OF ERROR NOS. 11 and 12.

The statements of the defendant testified to and over the objection and exception of the defendant as pointed out in these assignments of error is as follows:

"The defendant was asked what had become of the $2100.00 which had been given him by the Chinaman and he said he had owed a party $1500.00 and had forwarded it that day, September 6th, and he was in possession of $600.00 when we searched him. The defendant admitted he had purchased

the Cadillac Sedan in New York City from in front of Browns' Auction House and said he paid the sum of $1000.00 for it. The defendant stated he had come out from New York as far as Salt Lake City and had gone from Salt Lake City to Los Angeles via one of the trails."

ASSIGNMENT OF ERROR NO. 13.

The testimony which should have been stricken out as indicated in this assignment of error is the testimony quoted immediately above in connection with assignment of error numbers 11 and 12.

ASSIGNMENT OF ERROR NOS. 14 and 15.

The testimony admitted over the objection and exception of the defendant as indicated and pointed out by these assignments of error is as follows:

"It was very apparent that the number had been changed; there was no series letter." "The defendant stated that he had purchased the car for $1000.00 in New York and had driven it through to Salt Lake City and then to Los Angeles where he had registered it and then to San Francisco. I asked the defendant if he knew the car was stolen and he would not make much of a further statement. He said he had driven the car as far as Salt Lake City and then turned south and then went into Los Angeles, in this particular Cadillac Sedan."

ASSIGNMENT OF ERROR NO. 18.

The testimony which should have been stricken out as indicated by this assignment of error con-

stituted and is all of the testimony heretofore referred to and quoted and set forth in substance in connection with all the foregoing assignments of error.

A careful perusal and scrutiny of all of the testimony in the record will show that the only testimony offered to prove that the automobile was transported or driven or conveyed by the defendant, consisted of alleged statements made by the defendant and testified to by Government witnesses; and these statements of the defendant are absolutely unsupported by any other competent testimony; and with regard to alleged changes made in connection with the number of the automobile, or otherwise, there is absolutely no testimony as to when these changes were made and nothing to indicate that they were made by the defendant. The fact that the automobile in question was stolen and that it was actually transported by the defendant were essential parts of the *corpus delicti* to be established, and there is no attempt to establish these elements except by statements of the defendant, and therefore, the proof in this connection is absolutely insufficient, and the testimony covering statements of the defendant should have been rejected by the court under the objections of the defendant.

ARGUMENT.

The court erred in not instructing the jury to acquit said defendant at the conclusion of the pres-

entation of the case for the Government and of all of the evidence for the Government against said defendant. The evidence was insufficient to establish the allegations of the indictment or to convict said defendant and plaintiff in error, particularly in that it was not proven or established that the automobile in question and referred to in the indictment was stolen, and for the further reason that it was not proven or established that the said automobile was transported or driven or taken any place, or from state to state by said defendant, or that the automobile was ever in New York. There was no proof that the automobile named in the indictment ever had an owner, or that anyone other than said defendant was the owner of said automobile, or that the owner if any, of said automobile did not consent to the taking of the same by said defendant; there was no proof of a larceny or the stealing of said automobile by anyone; the only evidence covering the matters referred to in this paragraph consisted of alleged statements by the defendant and this evidence was incompetent and hearsay, because it was an attempt on the part of the Government to establish the *corpus delicti* of the offense alone by the admissions and statements of the defendant, when no other evidence had been introduced or was later introduced to establish the *corpus delicti*.

The *corpus delicti* consists of the elements of the crime in question.

People v. Tapia, 131 Cal. 647;
People v. Simonsen, 107 Cal. 346;
People v. Vertrees, 169 Cal. 404;
People v. Quarez, 70 Cal. Dec. 60 (decision concurred in by all the Justices of the Supreme Court of California).

In the instant case it must be conceded that the elements of the crime essential to the Government's case, involve at least the following propositions:

(a) That the automobile was transported by the defendant;

(b) That at the time it was a stolen automobile;

(c) That the defendant at the time knew that it was a stolen automobile.

That the automobile was in fact a stolen car is here recited as an essential element or part of the *corpus delicti,* because, proof that the defendant knew the automobile was stolen necessarily involves proof first that the automobile was in fact a stolen automobile. Proof of stealing or larceny with regard to particular personal property necessarily includes proof of ownership or right to possession in some one other than the defendant, under such circumstances that the property might be the subject of larceny; and furthermore, there must be proof that the property in question was taken without the consent of the owner or the one entitled to the possession of the property; and in the instant case there is a glaring failure of proof in this regard, because it is not shown that the automobile in ques-

tion ever had an owner or was ever in the possession of any one entitled to it, except the defendant; and if we invade the rights of the defendant and assume that someone other than the defendant owned the automobile or was entitled to its possession in New York, we then face the proposition that there is absolutely no proof that the owner or the person interested in its possession did not consent to the taking of the automobile by the defendant.

With regard to the other essential element, namely: the transportation of the automobile, there is absolutely no proof in the record other than certain alleged statements by the defendant hereinafter referred to. No witness testified that the automobile was ever out of California. It is true that the Government produced the testimony of the witness, Sutton (Transcript, page 43). But this witness testified merely that on August 10, 1922, a registration was made in a book of the Newhouse Hotel in Salt Lake City, Utah, under the name of Mr. and Mrs. D. Pearlman. This testimony at most establishes only that the defendant was in Salt Lake City on the date in question. In connection with this matter there is no proof whatever that the defendant was seen in the possession of any automobile in Salt Lake City, or that he drove any automobile or transported any automobile while in Salt Lake City, and it is not necessary to comment to any extent upon the fact that it is possible to obtain transportation to Salt Lake City, Utah, by some other means than an automobile conveyance;

and so we can find that there is a glaring failure of proof with regard to the element of transportation, a necessary part of the proof in this case.

It is true that the Government proved that the defendant, while in California, sold or traded the automobile, that he obtained a license in his name, but all of these acts as proved are entirely consistent with the innocence of the defendant. Even the fact that the engine number was not a Cadillac number is harmless in this case, because there is no proof that the defendant was responsible for it or had knowledge of it, and no proof as to when the change, if any, was made or whether it was made, if made at all, before or after the automobile came into the possession of or was bought by the defendant, and no proof that the automobile ever had a Cadillac engine number.

We come now to an important feature of the case, because it involves certain rulings of the trial court which were clearly erroneous. There is certain testimony in the record bearing upon the *corpus delicti* in the nature of alleged admissions or statements by the defendant, made at or about the time of his arrest or subsequent thereto. The witness, Adams, when recalled by the Government, in a desperate effort to bolster up the case testified as follows:

"Q. Did you have a later conversation in which he (referring to the defendant), stated what he found out about the car?

A. Yes, he said he did not know it was a stolen car until a few days after he left New York" (Transcript, page 56).

And this same witness, Adams, and certain other witnesses, testified that the defendant said he had bought the car in New York and had driven it to San Francisco, and they also testified that the defendant exhibited a bill of sale dated at Los Angeles, California, and signed by a man named Lewis.

In the first place the alleged statement by the defendant to the effect that he *did not know* it was a stolen car until after he had left New York, taken by itself is at best purely hearsay, and involves at best a mere conclusion or opinion and has no probative force whatever; and the fact that the defendant bought the car in New York and subsequently had his title confirmed by a bill of sale in Los Angeles, California, is not disproved by the Government and in this connection the fact stands out in bold relief in this case that Henry R. Leong, the witness produced by the Government who testified that he purchased the automobile in question from the defendant and obtained title through the medium of the defendant and by means of the defendant's claims upon the automobile in question, apparently obtained good and sufficient title to the automobile because, the record shows that Mr. Leong's ownership or title in the automobile, thus obtained, has never been disturbed, or disputed.

But if it is claimed that the alleged admissions and statements of the defendant have some evidentiary value, the important proposition remains that these alleged statements and admissions were inadmissible because, they consist of extra-judicial statements of the defendant forced into the record against the defendant by the Government in a case where there is absolutely no other proof of the *corpus delicti*. These alleged admissions and statements were properly objected to by the defendant by timely and adequate objections which were overruled (see Assignments of Error 5 to 15 inclusive, pages 81 to 84 of Transcript, also Assignment of Error No. 17, pages 87 and 88 of Transcript). And in order to avoid any question with regard to the order of proof the defendant at the conclusion of the Government's case made a proper motion to strike out all of this testimony (see Assignment of Error No. 18, page 89 of Transcript, and pages 94 and 95 of Transcript). And all of these matters with regard to the failure of proof on the part of the Government were adequately and properly covered by a motion made by the defendant at the conclusion of the Government's case, for an instruction by the court directing the jury to acquit the defendant (see Assignment of Error No. 1, page 79 of Transcript). See exceptions covering motion to strike out and motion for instructed verdict of acquittal, pages 62 and 63 of Transcript.

The proposition that extra-judicial statements of a defendant are insufficient to establish the *corpus*

delicti and that such statements are inadmissible unless, as a foundation for their admission, the *corpus delicti* is established by other proof, is as well recognized and as thoroughly established in criminal jurisprudence as the rule and the principle that a defendant cannot be forced to be a witness against himself.

In the recent case of the *People of the State of California v. D. Quarez,* 70 Cal. Dec. page 60, the Supreme Court of the State of California, in a decision concurred in by all of the justices of that court, has discussed in some detail the principles of law here involved, and the law set out in this decision as well as the cases therein cited clearly establishes the propositions contended for by the defendant in the instant case. The following are some of the decisions cited:

People v. Chadwick, 4 Cal. App. 63;
People v. Jones, 31 Cal. 565;
People v. Simonsen, 107 Cal. 345;
People v. Tapia, 131 Cal. 647;
People v. Vertrees, 169 Cal. 404;
People v. Johnson, 47 Cal. App. Dec. 392;
People v. Whiteman, 114 Cal. 338.

We also cite the case of *Naftzger v. U. S.,* 200 Fed. 494 (and cases enumerated at page 498).

On the part of this defendant it is also important to point out the matters involved in Assignment of Error No. 19 (page 90, Transcript). After the jury had deliberated for some time upon this case and had been unable to agree upon the verdict they

came into court and asked for certain instructions and thereupon the court instructed the jury as set forth in pages 90 to 92 of the Transcript. The jury unquestionably felt that there was a lack of proof covering the matter of the larceny of the automobile and the defendant's knowledge of the same as indicated by the questions asked of the court by the jury. We submit that these instructions complained of are erroneous because the defendant was charged specifically in the indictment with transporting an automobile from New York to San Francisco knowing the same to be stolen and when this whole matter was specifically touched upon by the jury it became the particular duty of the court, as it was already the court's duty (not complied with), to instruct the jury that the burden was upon the Government to prove that the automobile was in fact a stolen automobile and no such instruction was given then or at any other time by the court in response to the court's obligation to properly and completely define the elements of the crime in question and the necessary proof in support thereof.

The atmosphere of the trial of this case became one of hostility toward the defendant and his rights, and the defendant was deprived of a fair trial by reason of the erroneous ruling of the court and the prejudicial misconduct of the court as set forth and pointed out in Assignment of Error No. 16, appearing on pages 85, 86 and 87 of the Transcript. On account of the repeated efforts of the District Attorney to introduce evidence which was not admissible it of course became necessary for the defendant

to make repeated objections. In the ruling complained of the court criticized the defendant for making these objections and ruled that thereafter the witnesses of the Government should be allowed to tell all they knew about the case in narrative form, the defendant to merely have the right to make motions to strike out and objections after all of the testimony, including prejudicial and inadmissible testimony, had been heard by the jury. In other words, the procedure imposed upon the defendant by this ruling meant that the District Attorney should ask the witnesses a question, such as the following: "Mr. Witness, please state to the jury everything which you know about this case," and the defendant and his counsel were expected to remain mute while the story was being told and thereafter attempt to repair the damage done by making motions to strike out inadmissible and prejudicial testimony. After ruling that the witnesses should be allowed to testify in narrative form the court said, "you have objected to every statement, but do not interrupt this witness until he is through, *and then make all the objections you want to.*"

We most respectfully assert that a defendant has a right to object to *every statement* if as a matter of fact each and every statement sought to be introduced is inadmissible in evidence for specific and well recognized reasons. This incident occurred during the testimony of the witness Ehrlich, and was clearly prejudicial to the defendant in that the ruling denied to the defendant the right to proceed with his trial in accordance with the law and the

recognized and established rules of procedure. It may be claimed that the District Attorney did not take full advantage of this ruling, but nevertheless the damage was done by the ruling and it created an atmosphere of hostility toward the defendant and amounted to an invasion of the ordinary rights of the defendant, and prejudiced the defendant in the eyes of the jury in that it created an impression with the jury that the conduct of the defendant in making proper objections to the testimony offered by the Government was an indication of guilt on the part of the defendant and was improper conduct on the part of the defendant. It is impossible to clearly portray here the damaging effect of this ruling upon the cause of the defendant and the extent to which it disconcerted and humiliated counsel for the defendant, but the defendant and his counsel earnestly and sincerely assert that the prejudicial effect of this ruling had considerable to do with bringing about a verdict adverse to the defendant.

We respectfully submit that for the reasons stated and set forth in this brief, and upon all of the matters and things in the record in this case as submitted, the judgment of the lower court should be reversed.

Dated, San Francisco,
November 4, 1925.

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